BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARILYN K. FERGUSON	)	
Claimant	)	
	)	
VS.	)	
	)	
CONSTRUCTION BENEFIT AUDIT CORP.	)	
Respondent	)	Docket No. 1,027,599
	)	
AND	)	
	)	
HARTFORD UNDERWRITERS INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the July 23, 2007, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on November 6, 2007. Michael H. Stang, of Mission, Kansas, appeared for claimant. Anemarie D. Mura, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant injured her left knee as a result of a work-related accident of March 18, 2003. The ALJ further found, however, that claimant's low back condition preexisted the accident and was not made worse by claimant's knee injury. The ALJ gave more deference to the opinion of the independent medical examiner (IME), Dr. Scott Luallin than to the two other rating physicians, Dr. Mark Rasmussen and Dr. P. Brent Koprivica. Accordingly, the ALJ found that claimant has a 30 percent permanent partial impairment to the left lower extremity at the 200 week level.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the administrative file contains the deposition of claimant taken December 14, 2006. The ALJ's Award does not list it as part of the record. The deposition was not identified as either a discovery or evidentiary deposition. During oral argument to the Board, however, the parties agreed that this deposition was taken as a discovery deposition and is not part of the record.

ISSUES

Claimant requests review of the ALJ's finding that claimant's low back condition was not aggravated by the injury to her left knee. Claimant argues that she should not be limited to compensation for her left knee condition but is entitled to an impairment to the body as a whole and a work disability.

Respondent argues that there is substantial competent evidence in the record to support the Award and requests that the ALJ's Award be affirmed.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant worked as a field auditor for respondent. On March 18, 2003, she was going down some stairs while carrying a laptop computer and some files and pulling a rolling case. She bent down to pick up the case and stepped wrong, and her left knee popped. Claimant alleges she injured her knee as a result of that incident and claims she also aggravated a preexisting low back condition.

Claimant was involved in a motorcycle accident in 1977 and injured her pelvis and low back. As a result of the 1977 accident, she suffered chronic back pain. Intermittently, her back would go out and she would suffer painful muscle spasms, at times causing her to miss work. She took over-the-counter painkillers during these episodes. In the year before her March 18, 2003, injury, claimant missed work three or four times because of her back. She had problems picking things up because of her back; she had to be sure that she was equally balanced when she picked things up and could not lift a lot. She had trouble lifting the 50-pound boxes of paper at work because of her back. However, after her initial treatment for her injuries from the motorcycle accident, she did not see a doctor for her back until after her work-related accident of March 18, 2003. She said that she did not have continual back pain after the motorcycle accident; rather her back would give her problems and then she would have some relief for awhile.

Claimant also previously injured her left knee in a ski accident in 1983, which resulted in arthroscopic surgery. She had no problems with her left knee after the surgery until she injured it in March 2003.

After the March 18, 2003, injury, claimant was initially seen by Dr. Peter Vilkins, who obtained an MRI of her knee. The MRI showed she had a ligamentous tear. Dr. Vilkins performed arthroscopic surgery on her knee on April 30, 2003. Claimant was then sent to physical therapy, which did not go well. It was during this therapy that she began having back pain. Claimant also walked with a limp, which also aggravated her back pain. She

used crutches for awhile, and also used a cane once in awhile because her knee was weak and would give way.

Claimant continued to have problems with her knee, and a second surgery was performed on her left knee in October 2003, again by Dr. Vilkins. She got no relief from that surgery either. Her back also continued to bother her after the second surgery. Claimant told Dr. Vilkins and the physical therapist about her frequent low back pain, along with her knee problems. Claimant complained of low back pain during her physical therapy as early as June 18, 2003, but the first time that Dr. Vilkins noted she complained of back pain was in November 2003. Dr. Vilkins recommended that she see a back specialist, but claimant was afraid she would be told she needed to have surgery, which she refused to have.

Claimant returned to work but continued to have problems with her knee and back and used up a lot of sick leave and vacation leave. On May 19, 2004, claimant was referred to Dr. Rasmussen by respondent. He obtained another MRI of claimant's left knee and found a tear. Another surgery was performed on her left knee on February 3, 2005, to repair the tear. However, claimant received no relief of her knee pain from this third surgery. She also had no relief from her back condition. Dr. Rasmussen sent claimant to physical therapy, but again the therapy did nothing but aggravate her problems. He released her from treatment in July 2005.

Claimant returned to work sometime in June 2005. The only position available to her with respondent was her old position, and it was outside her restrictions. She worked for approximately two weeks when she was told that if she could not perform her duties, she should not come back. Claimant did not look for work elsewhere because she was not aware of any work that she could perform. She was awarded Social Security disability in August 2005. She has not been able to work because of a combination of her knee and back pain.

Dr. Mark Rasmussen, a board certified orthopedic surgeon, testified that he first saw claimant on May 19, 2004. At that time, she was complaining of knee pain. Dr. Rasmussen thought she had mild arthritis or degenerative joint disease of her knee. He recommended an injection. Claimant had already had two previous surgeries in the last 12 months, and he felt that her main complaint was arthritis. She was given an injection on May 19, 2004. Later, claimant was given a series of Supartz injections to lubricate the knee. She was also sent to physical therapy and was given home exercises.

On November 17, 2004, it was decided that claimant should have a repeat MRI because she was still having a lot of discomfort. The repeat MRI suggested that she still had a persistent medial meniscal tear. In February 2005, he performed a third surgery on her knee where he trimmed back a meniscal tear. However, after the surgery, claimant continued to have pain. In the middle of her recovery, she tore her calf muscle, which slowed her recovery. That injury resolved after a month or two.

On July 13, 2005, Dr. Rasmussen believed claimant had reached maximum medical improvement (MMI). He gave her a 25 pound maximum lifting restriction and told her to alternate sitting and standing for pain control. The maximum standing she could do per day was four hours. She was not to kneel, squat, climb or crawl. Those restrictions were based solely on the condition of her knee. Using the AMA *Guides*,[1] Dr. Rasmussen rated claimant as having a 9 percent permanent partial impairment to her left lower extremity.

Dr. Rasmussen said that at no time during his treatment of claimant did she complain to him about low back pain. His notes do not mention claimant's gait. She did wear an unloader brace, but Dr. Rasmussen did not think that would cause her to limp. However, he said that if claimant was walking with a limp, it could lead to discomfort in her back. Dr. Rasmussen does not work on spines and would not issue an opinion on a permanent partial impairment rating on claimant's back.

Dr. Rasmussen believes that ultimately, secondary to this injury, claimant will need a total knee arthroplasty. He gave her permanent restrictions to include maximum lift of 25 pounds, alternate sitting and standing as needed for pain control, maximum stand of four hours per day, no kneeling, squatting, climbing or crawling.

At the request of claimant's attorney, claimant was seen on May 31, 2006, by Dr. P. Brent Koprivica, who is board certified in emergency medicine and occupational medicine. He reviewed claimant's medical records and took a history from her that included the motorcycle accident in 1977 and skiing accident in 1983. Claimant told Dr. Koprivica that in 1979, she was told she had a disk herniation and was advised to have lumbar surgery, which she refused. Claimant, however, told Dr. Koprivica that there has been an increase in the problems with her back and right hip since the March 18, 2003, injury. Dr. Koprivica said that when he examined claimant, she had a marked limp and was not weight bearing in a normal fashion on the left leg.

Claimant complained of severe ongoing pain and weakness of her left knee. She has ongoing right hip and low back pain. After examination, Dr. Koprivica opined that claimant's March 18, 2003, injury resulted in a medial meniscus tear and an aggravation of a prior injury with development of progressive post-traumatic degenerative arthritis involving the medial compartment. He believed that claimant has disabling left knee pain. She is at MMI, short of having a total knee arthroplasty. He agrees with Dr. Rasmussen that claimant will need a total knee arthroplasty.

Using the AMA *Guides*, Dr. Koprivica rated claimant as having a 5 percent whole person impairment for her right hip pain and low back pain attributable to the March 18, 2003, injury. For the left knee, Dr. Koprivica would rate claimant as having a 20 percent

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

permanent partial impairment to the left lower extremity, which converts to a 8 percent whole person impairment. Using the Combined Values Chart, claimant would have a 13 percent whole person impairment. Dr. Koprivica rounded this up and found that claimant had a 15 percent permanent partial impairment to the body as a whole. These ratings are for claimant's impairment suffered in her March 2003 accident and do not include any impairment from her preexisting injuries.

In regard to restrictions, Dr. Koprivica recommended that claimant be allowed to wear her unloader brace and should be on her feet for intervals of less than 15 to 30 minutes as a maximum at any one time. Cumulatively, she should only be on her feet a total of between two to four hours as a maximum. She should sit for intervals of less than an hour at any one time but needs flexibility to be able to get up. She should do no squatting, crawling, kneeling or climbing because of her left knee condition. These restrictions are based upon a combination of claimant's neck and back injuries. The restrictions Dr. Koprivica recommends are attributable to the March 18, 2003, injury. He was not aware of any restrictions placed on claimant for any of her preexisting conditions.

Dr. Koprivica reviewed the task list prepared by Michael Dreiling. Of the ten tasks on that list, Dr. Koprivica opined that claimant could not perform seven, for a task loss of 70 percent.

Dr. Scott Luallin examined claimant on December 5, 2006, at the order of the ALJ for an independent medical examination. Claimant complained to him that she had anterior and medial left knee pain. She has intermittent giving way of the knee and uses a cane and an unloader brace. She has intermittent swelling and mechanical symptoms. Regarding her low back, claimant says that about once a month the pain is so bad it makes it difficult for her to walk. She has bilateral hip pain and aching.

Dr. Luallin believed that claimant injured her left knee on March 18, 2003. Despite the fact that she had previous injuries to the knee, she was asymptomatic before this injury. After this injury, claimant had three surgeries and had full thickness chondral loss and near complete absence of functional meniscus. This resulted in ongoing pain and limitation in the left knee. Claimant will need a future total knee arthroplasty as a result of the March 2003 injury. He concurred with Dr. Rasmussen's restrictions of a 25 pound lifting limit, maximum standing of 4 hours per day, and no kneeling, squatting, crawling or climbing.

Based on the AMA *Guides*, Dr. Luallin rated claimant's permanent partial impairment as 30 percent to the left lower extremity, which translates into a 12 percent whole body impairment. He further stated: "I believe her impairment is [*sic*] relative to her low back are [*sic*] preexisting and not appreciably effected [*sic*] by this current injury."[2]

[2] IME report of Dr. Luallin dated Dec. 5, 2006, filed with the Division Dec. 11, 2006, at 4.

Claimant met with Michael Dreiling, a vocational consultant, on August 8, 2006, at the request of her attorney. They compiled a list of 10 tasks claimant performed in the 15-year period before her accident of March 18, 2003. Mr. Dreiling stated that claimant was not working and therefore demonstrated a 100 percent wage loss. He further stated:

> When taking into account the totality of this individual's vocational profile, including the significant medical problems and restrictions, along with her educational background and work background, it becomes apparent that she is essentially and realistically unemployable in the current labor market.[3]

Mr. Dreiling stated that claimant's preexisting injuries have an impact on her in terms of limiting what she can and cannot do in the labor market.

Claimant told Mr. Dreiling that she had made no attempt to look for a job after leaving her employment with respondent. Given her physical condition, he did not find that unreasonable. He opined that if she somehow could find a job in a setting that was slow paced doing work that was not repetitive, with her experience and educational background, she could earn from $8 to $9 in the Kansas City labor market. He thought a part-time job working 20 hours a week would be more realistic than a full time job. However, in his opinion, claimant would not be able to work. In finding that claimant is unemployable, he took into account all of her medical conditions, including her preexisting medical conditions.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) states: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d states in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66

[3] Dreiling Depo., Ex. 2 at 10.

2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(16) For the loss of a leg, 200 weeks.

. . . .

(21) Permanent loss of the use of a finger, thumb, hand, shoulder, arm, forearm, toe, foot, leg or lower leg or the permanent loss of the sight of an eye or the hearing of an ear, shall be equivalent to the loss thereof. For the permanent partial loss of the use of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, compensation shall be paid as provided for in K.S.A. 44-510c and amendments thereto, per week during that proportion of the number of weeks in the foregoing schedule provided for the loss of such finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, which partial loss thereof bears to the total loss of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear; but in no event shall the compensation payable hereunder for such partial loss exceed the compensation payable under the schedule for the total loss of such finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, exclusive of the healing period. As used in this paragraph (21), "shoulder" means the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures.

K.S.A. 44-510e(a) states:

(a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability

exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination. The amount of weekly compensation for permanent partial general disability shall be determined as follows:

(1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66 2/3% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;

(2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and

(3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability

> under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[4] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[5]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act.[6] In *Nance*,[7] the Kansas Supreme Court stated:

> When a primary injury under the Kansas Workers Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

ANALYSIS AND CONCLUSION

Claimant does not allege she injured her back on March 18, 2003, when she injured her knee. Rather, her back complaints came on later. She sought treatment for her back on her own. Her first mention of back complaints was during physical therapy in June 2003. She did not mention her back to Dr. Vilkins until approximately eight months after her accident. Although he recommended claimant consult an orthopedic surgeon, claimant did not do so. Claimant made no complaints to Dr. Rasmussen concerning her back. He found no altered gait or limp that would aggravate her preexisting back injury. Dr. Koprivica, conversely, found claimant to have an altered gait to which he related claimant's back symptoms. Dr. Luallin noted claimant's antalgic gait but did not believe claimant's accident or knee injury caused an aggravation of claimant's preexisting back condition. The ALJ placed greater weight on the opinion of Dr. Luallin as to the nature and extent of claimant's work-related injury to conclude claimant suffered a 30 percent permanent impairment to her knee but no permanent impairment to her back. The Board agrees that

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[4] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[5] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[7] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 4, 952 P.2d 411 (1997).

claimant has failed to prove she permanently aggravated her preexisting back condition as a direct consequence of her March 18, 2003, accident.

The record does not contain a filed fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 23, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2007.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Anemarie D. Mura, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge